

These are the tentative rulings for civil law and motion matters set for Thursday, March 28, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, March 27, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

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EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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**1. M-CV-0035518      Chase Bank USA, N.A. vs. McClary, James R.**

Plaintiff's Motion to Vacate Judgment and Dismiss Action With Prejudice is granted.

**2. M-CV-0056024      GMAC Mortgage, LLC vs. Schmidt, Scot S., et al**

Plaintiff's request for judicial notice is granted. The court may take judicial notice of the dates, parties, and legally operative language in recorded documents. *Fontenot v. Wells Fargo Bank, NA* (2011) 198 Cal.App.4th 256, 264-265. Plaintiff's Motion for Summary Judgment is granted.

To prevail in an action for unlawful detainer following a foreclosure, plaintiff must show that (1) plaintiff purchased the property upon foreclosure and title following the foreclosure sale has been duly perfected, (2) defendant was served with a three-day written notice to quit the property, and (3) defendant continued in possession after expiration of the notice. Code of Civ. Proc. § 1161a(b)(3).

Plaintiff provides evidence that it purchased the property at a trustee's sale and said title was duly perfected. (Pltf. SSUF Nos. 1-4.) Plaintiff also shows that defendants were served with a notice to vacate. (Pltf. SSUF 5.) Finally, plaintiff submits evidence that defendants remain in possession of the property after expiration of the notice. (Pltf. SSUF 6-7.)

Defendants assert that plaintiff did not establish compliance with the required procedures for a trustee's sale pursuant to Civil Code section 2924. However, defendants have not tendered, or offered to tender, the amount due on their obligation under the deed of trust. An assertion of noncompliance with the procedure for trustee's sale in Civil

Code § 2924 does not raise a triable issue of material fact where defendant has not tendered the full amount of the debt for which the property was given as security. *Crummer v. Whitehead* (1964) 230 Cal.App.2d 264. Further, the foreclosure sale is presumed valid in the absence of substantial evidence of prejudice *6 Angeles, Inc. v. Stuart-Wright Mortgage Inc.* (2001) 85 Cal.App.4th 1279, 1284; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 89. Defendants submit no evidence regarding any purported prejudice to them. Nor do defendants submit any evidence to support allegations of fraud or the failure of plaintiff to comply with Civil Code section 2923.5. As defendants fail to raise any triable issues of material fact, summary judgment is appropriate.

**3. M-CV-0057104 Placer United Soccer Club - In Re the Petition of**

The Motion to Appoint a Provisional Director is dropped from calendar as no moving papers were filed with the court for the current hearing date.

**4. M-CV-0057116 Duerner, Gary et.al. vs. First American Title Co. et. al.**

Plaintiff's Motion for Sanctions is continued, on the court's own motion, to April 9, 2013.

**5. M-CV-0057302 6890 Park Place, Granite Bay, CA 95746 - In Re the Petition**

The Hearing to Determine Disbursement of Surplus Funds on Deposit is continued to April 25, 2013 at 8:30 a.m. in Department 40. The clerk shall send notice to the claimants identified in the trustee's declaration at the specified addresses. (Civil Code §2924j(d).) The clerk shall also include a copy of the court's tentative ruling process with the notice of the continued hearing. The time for filing a claim by any claimant shall follow the continued hearing date.

**6. M-CV-0057470 Granite Ranch Opportunities, LLC vs. Ploughe, Carol**

Defendant's Motion to Strike is denied. The ability to bring a motion to strike in an unlawful detainer proceeding has been recognized in California case law. (see *Saberi v. Bakhtiari* (1985) 169 Cal.App.3d 509, 517.) However, defendant's motion fails to make a sufficient showing to strike any portion of plaintiff's verified complaint.

Defendant shall file and serve an answer on or before April 2, 2013.

**7. S-CV-0022926 Ryan, Richard vs. River Valley Insurance Associates et al**

Plaintiff's Motion to Set Aside Default for Failure to Pay Transcript Costs on Appeal is dropped from calendar at the request of the moving party.

**8. S-CV-0024254                      Wood, Wendy et al vs. Dewante, Richard M. et al**

Defendant's Demurrer to the McDonald Fourth Answer, Demurrer to the Spohr Cross-Complaint, and Demurrer to the Wood/Spohr Second Amended Complaint are continued to April 11, 2013 at 8:30 a.m. in Department 40 at the request of the moving party.

**9. S-CV-0025696                      J.C. Construction Innovations, Inc. vs. Pinney, Russell Jan,**

The Motion to Dismiss or Continue the Trial is continued to April 11, 2013 at 8:30 a.m. in Department 40 at the request of the moving party.

**10. S-CV-0028742                      Tipton, Kyong, et al vs. Elliott Homes, Inc.**

Plaintiffs' Motion for Leave to File a First Amended Complaint is granted. The amended complaint shall be filed and served on or before April 5, 2013.

**11. S-CV-0028990                      McGhee, Erina vs. Miller, Brad Robert, et al**

Defendant Sutter Roseville Medical Center's two calendared hearings for Motions for Summary Judgment are dropped at the request of the moving party. A dismissal as to defendant Sutter Roseville Medical Center was entered on March 14, 2013.

Defendant City of Roseville's Motion for Summary Judgment, or in the alternative, Summary Adjudication, is dropped from calendar at the request of the moving party.

Defendants Placer County and Placer County Sheriff's Department's Motion for Summary Judgment, or in the alternative, Summary Adjudication **and Defendant Telecare Corporation's Motion for Summary Judgment** are continued, on the court's own motion, to April 4, 2013 at 8:30 a.m. in Department 40 to be heard in conjunction with plaintiff's recently filed Motion for Leave to Amend the Complaint.

**12. S-CV-0029932                      McCollam, Patrick, et al vs. Max Software, Inc., et al**

Plaintiffs' Motion to Compel Discovery Responses is denied. As to defendant Fred Ninow, the defendant has responded to the form interrogatories, requests for production of documents, and requests for admissions rendering this portion of the motion moot. (Garcia declaration, Exhibits A, B.) As to the request to compel the defendant's appearance at his deposition, the deposition notice does not comply with CCP§2025.250 and the current request does not appear to seek relief under CCP§2025.260.

As to defendant Max International, LLC, formerly known as ISP, while the defendant has been served, it has not appeared in the action. There is also no record in

the court file that defendant Fred Ninow's counsel represents this defendant to accept the service of any documents. Based upon this, the motion is denied as to defendant Max International, LLC, formerly known as ISP.

**13. S-CV-0030424                      Saladin, Jeffrey vs. Sanders, Trevor, et al**

Defendant/Cross-Defendant Hawkeye Home Inspection's (Hawkeye) Motion to Compel Arbitration and Stay the Entire Proceeding, or in the alternative, to Sever is denied in its entirety.

As an initial matter, the court notes that plaintiffs filed a non-stipulation to the commissioner on March 19, 2013. Placer Court Local Rule 20.2.B. states, "[w]hen the regularly scheduled law and motion calendar is heard by a Commissioner, the parties must file written notice indicating whether or not they stipulate to the Commissioner. Failure to file such a notice of stipulation or non-stipulation at least five (5) Court days prior to the hearing date for the motion will be deemed a stipulation to the Commissioner as a temporary judge per CCP §259(d) for all purposes other than trial." The court has heard several other matters in this case. Plaintiff's failure to file a non-stipulation to these prior hearings is deemed a stipulation to the court hearing all other matters other than trial. (Placer Court Local Rule 20.2.B.) Hence, the non-stipulation is untimely.

Plaintiffs' request for judicial notice is granted.

Pursuant to California law, a trial court shall order arbitration if it determines that an agreement to arbitrate the controversy exists, unless it is shown that either (1) the petitioner waived the right to compel arbitration, (2) grounds for revocation of the agreement exist, or (3) a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party arising out of the same transaction. (CCP§1281.2.) Essential to the analysis is the existence of an agreement by the parties to arbitration. A party's right to arbitration depends upon the existence of an agreement between the parties. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) The trial court determines whether the parties have a duty to arbitrate. (*Ibid*; *United Transportation Union v. Southern Cal. Rapid Transit Dist.* (1992) 7 Cal.App.4th 804, 808-809.) In analyzing this duty, the court considers the factual issues submitted by the parties to determine the threshold issue of arbitrability. (*Engineers & Architects Assn. v. Community Development Dept.*, *supra*; *Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.)* (1998) 62 Cal.App.4th 348, 356-357.) The petitioner bears the burden of establishing the existence of a valid agreement to arbitrate and the opposing party bears the burden of proving, by preponderance of the evidence, any facts necessary to its defense. (*Ibid*; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.)

Hawkeye has failed to provide sufficient evidence that the parties agreed to be bound to the arbitration clause. This application rests upon the Overton declaration, attached as Exhibit A is a copy of the inspection report that is alleged to encompass the

written agreement of the parties. The arbitration clause appears on pages 12 and 13 under the heading “Report Limitations” and states as follows:

“Should any disagreement or dispute arise as a result of this inspection or report, it shall be decided by arbitration and shall be submitted for binding, non-appealable arbitration to the American Arbitration Association in accordance with its Construction Industry Arbitration Rules then obtaining, unless the parties mutually agree otherwise. In the event of a claim, the Client will allow the Inspection Company to inspect the claim prior to any repairs or waive the right to make the claim. Client agrees not to dispute or repair or have repaired anything which may constitute evidence relating to the complaint, except in the case of an emergency.” (Overton declaration, Exhibit A – Inspection Report, p. 12-13.)

The Overton declaration provides details of the inspection process between the parties, the preparation of the Inspection Report, the payment for the report, and the failure of plaintiff to notify Hawkeye of any issues regarding the report. The single reference to the arbitration clause made by Mr. Overton appears in paragraph 11, which states “[a]fter we walked around the Property, Dr. Saladin and I reviewed the contents of the Inspection Report which contains a binding arbitration agreement to resolve disputes arising out of my inspection and report.” (Overton declaration, ¶11.) This single reference is insufficient to establish a mutual intention by the parties to agree to arbitration. “Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding facts and circumstances of a particular case and is a question of fact for the trial court. [Citations omitted.]” (*Banner Entertainment, Inc. v. Superior Court (Alchemy Filmworks, Inc.)*, *supra*, 62 Cal.App.4th at p. 358.) Hawkeye presents insufficient evidence to the court that establishes the parties agreed to the arbitration clause. Overton’s declaration merely shows that a clause was included in the inspection report. There is insufficient evidence presented establishing the parties discussed the provision and agreed to be held to the provision; essentially, there is no showing of a “meeting of the minds” on this material point. (*Id.* at pp. 358-359.) Based upon the foregoing, the request to compel arbitration and stay the proceedings is denied.

As to the request to sever the eighth cause of action in the complaint, CCP§1048(b) states, “[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross-complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the Constitution or a statute of this state or of the United States.” A motion to sever falls within the sound discretion of the trial court. (*Carpenson v. Najarian* (1967) 254 Cal.App.2d 856; *Vegetable Oil Products Co. v. Superior Court for Los Angeles County* (1963) 213 Cal.App.2d 252.) Hawkeye has failed to make a sufficient showing to warrant severance of the eighth cause of action from remainder of the proceeding. It also fails to address the impact of such a severance in

light of Hawkeye being named in defendant/cross-complainant Sanders' cross-complaint. Therefore, the request for severance of the eighth cause of action is also denied.

**14. S-CV-0030586                      Lee, Tukfung vs. Liu, Belinda B., et al**

Appearance of the parties required for the Plaintiff's Motion for Terminating Sanctions and Monetary Sanctions.

Plaintiff's request for telephonic appearance is granted. The court will contact counsel at the time the matter is called for hearing.

**15. S-CV-0030665                      Needles, Robert vs. Surewest Communications, et al**

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, such argument shall be heard at 8:30 a.m. in Department 42:

Plaintiffs' unopposed Motion for Final Approval of Class Action Settlement is granted. The court has broad discretion to determine whether a settlement is fair, adequate, and reasonable. (*Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 234-235; Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801.*) When reviewing the fairness of the settlement, the court is to give due regard to the parties' agreement, ensuring that the agreement is not a product of fraud, overreaching parties, or collusion and that the settlement, as a whole, is fair, reasonable, and adequate. (*Dunk v. Ford Motor Co., supra; 7-Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal.App.4th 1135, 1145.*) A presumption of fairness exists where: (1) the settlement was reached through arms-length bargaining; (2) the investigation and discovery were sufficient to allow class counsel and the court to act intelligently; (3) class counsel is experienced in similar litigation; and (4) there is a small percentage of objectors. (*Wershba v. Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 245.*) The court has carefully reviewed and considered the stipulation of settlement and plaintiffs' moving papers filed in connection with the motion. The court determines a sufficient showing has been made that the settlement is fair, adequate, and reasonable.

For the purposes of settlement, the court hereby certifies the class as defined in Paragraph 1.15 of the Stipulation of Settlement. The court grants final approval of the stipulation of settlement and approves \$525,000 in attorneys' fees and expenses as outlined in Paragraphs 5.1 through 5.3 of the Stipulation of Settlement. The court also incorporates by reference the findings and orders as outlined by the plaintiffs in their proposed final judgment. The court retains jurisdiction over the parties to enforce the terms of the judgment. (*California Rules of Court, Rule 3.769(h).*)

**16. S-CV-0031482                      Stone, Elizabeth, et al vs. Rinella, Dorian, et al**

Defendants' six motions to compel form interrogatories and request for production of documents are dropped from calendar at the request of the moving party.

**17. S-CV-0031606            Amin, Hemal vs. Lennar Renaissance, Inc., et al**

The Motion for Leave is dropped at the request of the moving party. The court has also been informed that the matter has settled.

**18. S-CV-0031616            Patterson, George, et al vs. Sutter Health Sacramento, et al**

Defendant's Demurrer to the Second Amended Complaint (SAC) is overruled. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson High School* (1996) 50 Cal.App.4th 726, 733.) All properly pled facts are assumed to be true as well as those facts that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint, when read as a whole, states sufficient facts establishing a non-emergency situation and states a cause of action against the defendant.

Any answer or general denial shall be filed and served on or before April 5, 2013.

If oral argument is requested, defendant's request for telephonic appearance is granted. The court will contact counsel at the time the matter is called for hearing.

**19. S-CV-0031648            Hayes, James vs. State of California, et al**

Defendant Sharon Lingo's Motion to Compel Discovery Responses is continued, on the court's own motion, to be heard in conjunction with the Motion to Compel set for April 18, 2013 at 8:30 a.m. in Department 40. The defendant shall file her reply seven court days prior to the continued hearing date.

**20. S-CV-0031690            Rodatos, Alex vs. Bank of America, N.A., et al**

The Demurrer to the Complaint is continued, on the court's own motion, to be heard by the Honorable Michael W. Jones on **April 11, 2013** at 8:30 a.m. in Department 43.

**21. S-CV-0031780            Campbell, William and Maureen vs. Bank of America, N.A.**

Appearance required.

Defendants' Demurrer to the FAC is sustained. Defendants' request for judicial notice is granted pursuant to Evid C§452. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.)

The first cause of action for fraud fails to allege sufficient facts establishing a misrepresentation, justifiable reliance, or damages suffered by the plaintiffs. (*Perlas v. GMAC Mortg., LLC* (2010) 187 Cal.App.4th 429, 434.)

The second cause of action for promissory estoppel fails to sufficiently allege reliance upon a clear and unambiguous promise that resulted in damages. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901 citing *Laks v. Coast Federal Savings & Loan Ass.* (1976) 60 Cal.App.3d 885, 890.)

The third cause of action for negligent misrepresentation fails to allege sufficient facts alleging reasonably justified reliance upon a misrepresentation by the defendants that resulted in damages. (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 50.)

The fourth cause of action for civil conspiracy to defraud fails to allege sufficient facts establishing a duty to the plaintiffs since a lender is only liable where it actively participates and exceeds its scope beyond that of a money lender. (*Nymark v. Heart Fed. Sav. & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.)

The fifth cause of action for UCL violations fails to allege sufficient facts showing unfair, unlawful, or fraudulent activity on the part of the defendants. (*Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal.App.4th 638, 643-644.)

Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. (*Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302.) A demurrer will be sustained without leave to amend absent a showing by plaintiffs that a reasonable possibility exists that the defects can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The court presumes the facts alleged in the complaint and in the moving papers state the strongest case for the Plaintiff. (see *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1286.) In this case, the plaintiffs cannot cure the defects to the complaint. The demurrer is sustained without leave to amend.

If oral argument is requested, the requests for telephonic appearance are granted. The court will contact both counsel at the time the matter is called for hearing. The court notes that according to the court's file, counsel of record for plaintiff is David Smart. There is no record in the file of Mandeep Dhaliwal as counsel for the plaintiff nor does Ms. Dhaliwal appear on the pleadings submitted to the court. The court will contact Mr. Smart, who is listed as counsel of record and is requesting the telephonic appearance, at the telephone number on file with the court.

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**22. S-CV-0032126                      Rawlins, Christopher vs. Western Dental Services, Inc., et al**

Defendant's Demurrer is dropped from calendar. The plaintiff filed a first amended complaint on March 27, 2013.

**23. S-CV-0032206                      Karen Roberts vs. Sierra Pacific Mortgage Company, Inc.**

Defendant Sierra Pacific Mortgage Company, Inc's Demurrer to the Complaint is dropped from calendar. A dismissal as to the defendant was entered on February 25, 2013.

**24. S-CV-0032285                      Serenbetz, Dylan - In Re the Petition of**

The Minor's Compromise Petition is granted. If oral argument is requested, the appearance of the minor at the hearing is waived.

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